

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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DEC - 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 95 of the Commission's) WT Docket No. 98-169
Rules to Provide Regulatory Flexibility) RM-8951
in the 218-219 MHz Service)

To: The Commission

ERRATUM TO REPLY COMMENTS OF IVDS COALITION

The IVDS Coalition (the "Coalition"), by its attorneys, hereby submits an erratum to its reply comments on the *Notice of Proposed Rulemaking* issued in the above-captioned proceeding (the "*NPRM*").

The Coalition recently received a communication from Concepts to Operations ("CTO"), a commenting party in the captioned proceeding. CTO alerted the Coalition to the fact that it may have misunderstood the thrust of CTO's Comments. CTO also pointed out a typographical error in the Coalition's Comments which inaccurately attributed technology developments to CTO rather than another party.

The Coalition has reviewed CTO's Comments, in light of CTO's recent communication, and finds that the Coalition misunderstood CTO's position in the captioned proceeding. The Coalition understands that the positions of CTO and

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the Coalition are generally aligned in the captioned proceeding. The Coalition is pleased to understand that CTO supports the Commission's proposed regulatory relief. CTO's understanding of the technical challenges which 218-219 MHz licensees have faced, as well as the rules regarding avoidance of harmful interference applicable to all Commission licensees, will add significantly to the debate of the issues raised in this proceeding.

The Coalition also recognizes that its Reply Comments included a typographical error which attributed to CTO the development of a 900 MHz based alternative to services which were designed originally for IVDS. In fact, Radio Telecom & Technology ("RTT") is the company which has adapted its IVDS application to 900 MHz use. The Coalition inadvertently attributed the development to CTO.

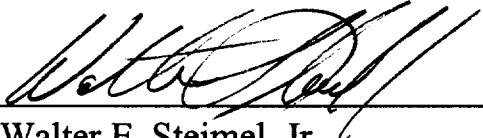
The Coalition has prepared corrected pages and submits a corrected filing with this Erratum. The Coalition and its counsel apologize for any inconvenience that these inadvertent errors may have caused the Commission or CTO, and appreciate CTO clarifying its position to the Coalition. As the corrections do not affect the substance of the Coalition's Reply Comments, acceptance of this Erratum will not prejudice any party and will set the record straight with respect to CTO. In order to minimize any confusion arising from this filing, the Coalition

will serve a copy of this Erratum on each party filing Comments in the instant proceeding.

The Coalition asks that the Erratum be accepted and the Corrected Reply Comments be accepted in lieu of the originally-filed Reply Comments.

Respectfully Submitted,
IVDS COALITION

By: _____


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December 8, 1998

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To: The Commission

CORRECTED REPLY COMMENTS OF IVDS COALITION

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Summary of Comments

In this proceeding, the Commission has proposed a number of changes to its regulations governing 218-219 MHz service. These changes are intended to grant 218-219 MHz licensees relief from unnecessarily restrictive regulations and to provide them with the freedom necessary to respond to market forces and opportunities. The IVDS Coalition (the “Coalition”), an *ad hoc* coalition of auction licensees is generally supportive of the Commission’s proposal but urges the Commission to go further. Indeed, in light of the highly checkered, fraud-marred history of 218-219 MHz auctions, much of the blame for which is directly attributable to the Commission, the Coalition asserts that the Commission has a non-discretionary obligation to afford additional relief to auction licensees. Failing to provide such relief would be arbitrary, capricious and an abuse of discretion.

Turning to the Commission’s specific proposals, the Coalition agrees with those Commenters that support the Commission’s proposal to allow licensees to choose to be treated as either PMRS or CMRS services. It rejects as unduly discriminatory, however, the Commission’s proposal to require 218-219 MHz providers to specifically identify which type of service they will provide.

The Coalition backs those commenters that support the Commission’s proposal to extend auction licensees’ license terms from five years to ten and to permit a corresponding reamortization of principal and interest payments over the ten year term. The Coalition further asks the Commission to delay the commencement of installment period under the reamortization plan for six months and to allow interest on the principal balance to be calculated on the basis of the ten-year U.S. Treasury rate as of the date that a final Report and Order is issued in this proceeding.

Building on suggestions made by a number of commenters, the Coalition requests that the Commission adopt a more comprehensive amnesty plan for all auction licensees that made their original down payments. Such licensees should be allowed to surrender their licenses and undo the auction with a minimal penalty. Moreover, the Commission should allow auction licensees a special window of opportunity to buy defaulted licenses before reauctioning them and permit such licensees to take full advantage of small business bidding credits if a reauction is held.

The Coalition generally agrees with those Commenters that support the Commission's proposed technical changes and changes in service and construction requirements. The Coalition rejects the specious claims made by some commenters suggesting that 218-219 MHz service creates interference with TV Channel 13 that necessitates special regulatory treatment.

The Coalition joins with the many Commenters that support the Commission's proposal to allow free aggregation, disaggregation and partitioning of existing auction licenses.

Finally, the Coalition agrees with those commenters that urge the Commission not to use this proceeding to confer undeserved benefits on lottery licensees. Unlike auction licensees, lottery licensees paid essentially nothing for their licenses. The Commission should allow all lottery licenses to expire at the end of their original five year terms and reauction them.

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CORRECTED REPLY COMMENTS OF IVDS COALITION

IVDS Coalition (the "Coalition"), by its attorneys, hereby submits its corrected reply comments on the *Notice of Proposed Rulemaking* issued in the above-captioned proceeding (the "*NPRM*").

I. The Members of the Coalition will be Affected Directly by The Rules Adopted in this Proceeding.

The Coalition is an *ad hoc* coalition of 218-219 MHz licensees¹ all of whom became licensees as a result of their participation in the IVDS auctions of July 28

¹ IVDS Coalition is comprised of Frances S. Lyles, Joanne Hartley, Two-Way TV, One Number Information Systems, Inc., SBM Holdings, Wireless Express and Red Hot Radio. Every member of the IVDS Coalition was a "designated entity" pursuant to the criteria set forth in *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330, 2336-2340 (Defining and describing benefits afforded to "designated entities.") (1994), *i.e.* they were, and are, small businesses or minority/female owned businesses.

and 29, 1994. As a licensee in the 218-219 MHz service, each member of the Coalition will be affected directly by the rules adopted through this proceeding. The *NPRM* proposes wholesale changes in the Commission's regulatory treatment of 218-219MHz service licensees. While the Coalition appreciates and generally supports the proposed changes in the rules, it submits that, in light of the uniquely convoluted history of 218-219 MHz service, the proposed changes do not extend sufficient relief to restore and encourage the growth of the 218-219 MHz industry. The Coalition urges the Commission to expand the relief proposed, as described herein, to encourage the growth of the 218-219 MHz industry to its full potential.

II. The Coalition Generally Supports the Proposed Rules.

The Coalition generally supports the Commission's goal of "maximiz[ing] the efficient and effective use of the 218-219 MHz Service" by providing, "maximum flexibility for 218-219 MHz service licensees, and a regulatory structure that will enable [licensees] to meet the public's current and future needs through the most technically and economically efficient use of the spectrum practicable." *NPRM* at (¶ ¶ 1, 31). The Coalition agrees with the substantial majority of Commenters who support the Commission's proposal to lift the needlessly restrictive technical regulations that have stymied the development of 218-219 MHz service. With most of the Commenters, the Coalition urges the

Commission to allow market forces to operate. *See, e.g., Comments of the Bay Area 218-219 MHz Group ("Bay Area")*, at 3-4; *Comments of ITV, Inc. and IVDS Affiliates, L.L.C. ("ITV/IALC")*, at 3-5.

The Coalition also agrees with the many Commenters that urged the Commission to recognize the extraordinary mistakes made and abuses wrought by the two previous Commission administrations in the implementation and administration of the IVDS auctions. The members of the Coalition were actively encouraged and enticed, to participate in the IVDS auctions. This Commission should not punish the Coalition's members for structural defects and gross frauds for which they were in no way responsible. Instead, as other Commenters have suggested, the Commission should go beyond the *NPRM* proposals and take full advantage of this opportunity to rectify the past by granting additional relief to aggrieved auction licensees, such as the members of the Coalition. *See, Comments of MKS Interactive, Inc. ("MKS")*, at 3²; *Comments of Boston Spectrum Associates, L.L.C. and Houston Spectrum Associates, L.L.C. ("BSAL/HSAL")*, at 1-

² The pages in the *Comments of MKS* are not numbered. Accordingly, for convenience's sake, citations to those comments will refer to pages within the "Comments" portion of MKS's filing (*i.e.* introductory and background pages will be excluded from the page count.)

7; *Bay Area* at 4-6; *Comments of Commercial Realty St. Pete, Inc.* ("CRSPI"), at 2-6.

The history of IVDS is unprecedented. It is rife with missteps and outright fraud. These unquestionably unique circumstances warrant expansion of the relief proposed in the *NPRM*. Expansion of the relief, as suggested by various Commenters and supported by the Coalition, will not conflict with any other authorized service. Grant of the relief proposed herein also will not set precedent for amending auction results in any other service. The Commission has been embarrassed by the IVDS auction results and certainly has learned significant lessons in the conduct of spectrum auctions from the IVDS fiasco.

One significant lesson the Commission has learned is evidenced by footnote 8 in the *NPRM*. In footnote 8, the Commission states, in part, that "the Commission makes no representations or warranties about the use of this spectrum for particular services." In stark contrast to the statement in footnote 8, the Commission, in its 1994 publication entitled "Welcome to the Auction," referred to IVDS as the "access ramp to the information superhighway." It also boldly pronounced that "IVDS technologies will have a major impact on our society in the 21st century." The Commission also proclaimed that "IVDS services may include home banking and home shopping with television viewer interaction in

real time." Other glowing statements of promise and praise were made by the Commission and its then-Chairman, Reed Hundt, at many other times as outlined in the various Comments.³

Now, the Commission carefully cautions potential bidders that an FCC license does not "constitute a guarantee of business success," and urges licensees to "perform their individual due diligence before proceeding as they would with any new business venture."

After the auction, when problems with the availability of equipment or applications were identified, the FCC stated that the licensees should have undertaken due diligence.⁴ The current Commission must consider these earlier *post-hoc* admonishments in light of the unusual circumstances surrounding the implementation of IVDS.⁵

³ *BSAL/HSAL* at 5-6; CRSPI at 13-14.

⁴ *Requests for Waiver in the First Auction in the Interactive Video and Data Service ("IVDS") Licenses*, 11 FCC Rcd 8211, 8213 (1996).

⁵ The Coalition notes, with serious concern, that the Chairman of the FCC at the time of the IVDS auctions was Reed Hundt. Prior to joining the Commission, Mr. Hundt, was a partner with the law firm of Latham & Watkins. Latham & Watkins provided counsel to EON Corporation, the company which sponsored the development of IVDS. Without question, the Chairman played a substantial role in the initiation of the IVDS licensing regime. Latham & Watkins also played a substantial role in the initial authorization of IVDS. At no time did Mr. Hundt disclose his close and personal relationship with EON. The Coalition finds this potential conflict of interest noteworthy and suggests that the Commission may

(continued . . .)

IVDS was a new service. It was touted by the Agency and its proponents as a new wave of technology, sure to be the onramp to the communications super highway. As of the date of the auction, only two devices, a CTS and an RTU, had received type acceptance from the Commission. The type acceptances for the CTS and the RTU were issued to EON Corporation on March 1, 1994. EON request and received confidential treatment for the "theory of operation, block diagrams, list of active devised, alignment procedures, technical specifications and schematics" set forth in its type acceptance applications.⁶ Any other applications for type acceptance of equipment to operate IVDS stations would have been unavailable for inspection or due diligence review by potential bidders under the Commission's rules concerning confidentiality of type acceptance applications.⁷

Bidders at the IVDS auction, therefore, were able only to observe the demonstrations provided by the proponents of the service. IVDS bidders were not able to review the type-acceptance applications to ascertain independently that the equipment could perform the advertised functions. Because of the Commission's

wish to investigate whether the relationship led to the fiasco that IVDS has become. *CRSPI at Attachment A*, at 3, 14-16.

⁶ See Letters from Julius P. Knapp to EON Corporation, dated March 3, 1994 and September 8, 1994, attached hereto as Attachments 1 and 2.

⁷ Section 0.457(d)(1)(ii) of the Commission's rules, 47 C.F.R. § 0.457(d)(1)(ii).

duly secretive type-acceptance process, no amount of due diligence possibly could have signaled the problems that IVDS licensees would experience.

Now, some four years after the IVDS auction, EON, for all practical purposes, no longer exists. It burned through roughly 40 million dollars attempting to create IVDS equipment and essentially disappeared. The Coalition, like other Commenters, was surprised and dismayed at EON's disappearance after its strong influence on the Commission led the Agency to importune them to participate in the IVDS auctions.

In short, given the staggeringly long and varied series of questionable influences, misjudgments, errors, delays and outright frauds that characterized the IVDS auction, it would be arbitrary and capricious and an abuse of discretion under Section 706(2)(a) of the Administrative Procedure Act (“APA”), 47 U.S.C. § 706(2)(a), if the Commission failed to do everything possible in this proceeding to make 218-219 MHz licensees whole. Although federal agencies are entitled to presumptions of administrative regularity, integrity and good faith these presumptions are rebuttable and agency actions may be overturned when they are tainted by fraud or driven by considerations other than the public interest.⁸ The

⁸ For example, in *Woods Petroleum Corp. v. U.S. Dep’t of the Interior*, 18 F. 3d 854 (10th Cir. 1994), the court rejected an agency’s pretextual justification for
(continued . . .)

Commission's unduly solicitous concern for the interests of companies like EON and its adoption of auction procedures designed to extract as much revenue from IVDS auction participants as possible, also contravened the APA because they are also inconsistent with the goals Congress set forth when it authorized the Commission to conduct spectrum auctions in the first place.⁹

Moreover, when the government allocates benefits or rights to government owned property through a bidding process the bidders participating in the allocation process have a right to a "legally valid procurement process."¹⁰ The Commission clearly failed to conduct the IVDS auction as a legally valid process, in light of the myriad improprieties and defects afflicting the IVDS auction

its action, which masked an illegitimate, ulterior motive, and reversed the Agency's decision.

⁹ See, Section 309(j)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j)(3). Specifically, Congress sought to foster the "development and rapid deployment" of new communications technologies and to "disseminat[e] licenses among a wide variety of applicants" including those small businesses and minority or female owned enterprises that the FCC formerly termed "designated entities." 47 U.S.C. § 309(j)(3)(A)&(C). By allowing the 218-219 MHz auction process to turn into an utter, and infamous, fiasco the Commission has thwarted the will of Congress, frustrated the development of 218-219 MHz service, and discouraged future efforts by small businesses and female or minority owned enterprise to participate in the telecommunications marketplace.

process. When considering auctions generally, courts have found that auctioneers have a duty not to commit misrepresentations or knowingly conceal information that would indicate a fraud is taking place.¹¹ Although the FCC is immune to tort suits based on fraud theories, it had a dual obligation to ensure its auction was conducted fairly. The Commission has a general duty to act in the public interest when establishing new services and awarding licenses.¹² As the sponsor of an auction, it undertook the duties imposed on auctioneers, generally, to refrain from inaccurate claims about the subject of the auction. In considering its charge as a federal agency and as an auctioneer, and in light of the fiasco the IVDS auction became, the Commission must now make auction licensees whole for losses they have suffered as a result of the mismanaged IVDS auctions. If the Commission fails to honor this obligation, many auction licensees may seek redress through actions seeking judicial rescission of their purchases.

¹⁰ *National Maritime Union of America v. Commander*, 824 F.2d 1228, 1237 (D.C. Cir. 1987); *Varicon International v. Office of Personnel Management*, 934 F. Supp. 440, 448 (D. D.C. 1996).

¹¹ *See, e.g., Pelster v. Ray*, 987 F.2d 514 (8th Cir. 1992).

¹² *See, e.g.,* Sections 303 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § § 303 and 309.

III. Specific Positions of the Coalition:

A. Licensees Should Be Allowed to Choose to Provide Service as Either PMRS or CMRS Carriers.

The Coalition joins with the overwhelming majority of Commenters that support the Commission's proposal to re-designate 218-219 MHz service as a service that can be used for either private radio ("PMRS") or common carrier ("CMRS") service at the option of the licensee. *NPRM* at ¶ 33; *Comments of In-Sync Interactive Corporation* ("In-Sync"), at 3-4; *ITV/IALC* at 4; *Comments of Kingdon R. Hughes* ("Hughes"), at 3-4.; *MKS* at 1. *Comments of Dispatch Interactive Television Company* ("DITV"), at 3; and *Comments of Community Teleplay, Inc.* ("CTI") at 18. There is absolutely no valid reason why 218-219 MHz licensees should not enjoy the same freedom of choice that the Commission affords to licensees of other bands that can be used to provide PMRS or CMRS service. To the contrary, providing licensees with greater flexibility will only serve to promote competition and thereby benefit the public interest.

Consistent, however, with the principle of non-discrimination, the Coalition joins with In-Sync Interactive Corporation in opposition to the Commission's proposal to require 218-219 MHz providers to specifically identify which type of service they will provide. *NPRM* at ¶ 33; *In-Sync* at 3-4. Other carriers are not subjected to such a disclosure requirements and it is difficult to understand why

the Commission would want to impose a new competitive handicap on 218-219 MHz licensees by forcing them to comply with a pointless new regulation.

Only one Commenter in this proceeding asserted that giving 218-219 MHz licensees the right to choose to provide PMRS or CMRS service would not serve the public interest. AirTouch Paging ("AirTouch") complains that the proposed revisions would "so substantially modify the character of the services that may be offered by licensees in the 218-219 MHz frequency band as to eliminate the possibility they will be used to provide the intended services and would at the same time significantly change the value of the licenses held and undermine the integrity of the auction process." *AirTouch Comments* at 3. While AirTouch fails to explain its interest in "protecting" the offering of interactive video and data services, its motives for obstructing the expansion of services to be offered by 218-219 MHz licensees is patently clear. It fears competition.

Interestingly, AirTouch has favored flexibility for carriers when that flexibility would enable it to better serve its customers. AirTouch Communications' Comments in *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, submitted May 8, 1998, at 5; and submitted June 25, 1998, at 9. By contrast, when a

proceeding might benefit a competitor, AirTouch opposes any relaxation of requirements. In the *1998 Biennial Regulatory Review -- Testing New Technology*, the Commission proposed a relaxation of the experimental licensing process, in order to encourage innovation. AirTouch cautioned that the Commission's experimental licensing processes must "continue to place the burden of proof on experimental license applicants to demonstrate (prior to commencing operations) that their operations will not cause harmful interference to incumbent operators." AirTouch Comments in *1998 Biennial Regulatory Review -- Testing New Technology*, CC Docket 98-94, submitted July 21, 1998, at 3-4. In any given situation, AirTouch weighs in on the side of the competition issues which protects its narrow business interest -- rather than the public interest. Accordingly, the Coalition urges the Commission to ignore Air Touch's self-serving, anti-competitive comments. Instead, the Commission should favor competition and adopt the proposed rule which would enable licensees in the 218-219 MHz band sufficient flexibility to adapt to consumer needs.

B. Extension of License Terms and Amortization Periods to Ten Years

The Coalition supports the position taken by ITV/IALC and other Commenters in favor of the *NPRM's* proposal to extend the term of licenses awarded by auction from five to ten years and to permit a corresponding re-

amortization of principal and interest payments over the remainder of the ten year term. *See, NPRM* at 21-22, *ITV/IALC* at 6-8. Moreover, the commencement of installment payments pursuant to the re-amortization should be delayed for a six-month period to provide licensees a badly needed opportunity to take stock of the Commission's regulatory revisions and to obtain new capital.

ITV/IALC additionally proposes that interest on the principal balance be calculated based on the ten-year U.S. Treasury rate as of the date of the adoption of rules pursuant to the *NPRM*.¹³ The Coalition supports ITV/IALC's proposal to calculate interest based on the rate as of the date of adoption of the new rules for all the reasons cited in ITV/IALC's Comments. Additionally, setting the rate as of the date of re-amortization is consistent with usual and customary commercial practices, will facilitate new financing, and is ultimately fair to the Commission, the U.S. Treasury and to the 218-219 MHz Licensees. As notes have never been issued, the notes should bear the intent rate applicable on date of issuance.

¹³ For purposes of comparison, the Coalition provides a chart setting forth the varying 5-year Tables of Treasury Security rates for a five and ten year period are also attached. Treasury Security rates, on a monthly basis, since January, 1995. The chart is the copyrighted work of Mortgage-X and is attached hereto as Attachment 3.

C. The Coalition Supports an Equitable Amnesty Plan.

The Coalition supports a hybrid amnesty plan which combines the best and fairest elements of the proposal introduced by other Commenters. *See, MKS at 1-2; ITV/IALC at 8; Comments of Richard L. Vega ("Vega") at 1; and Bay Area at 5* The technical defects, lengthy delays, and rampant fraud, that plagued the IVDS auctions rendered them uniquely suspect and oblige the Commission to provide full amnesty for licensees, such as the members of the Coalition, that were injured. Certainly, the Commission's amnesty program for 218-219 MHz licensees should not be less favorable to licensees than other amnesty plans the Commission has developed. *MKS at 3.*

Any amnesty proposal should allow licensees in the 218-219 MHz service to surrender their licenses and undo the auction with minimal penalty. The Coalition urges the Commission to adopt MKS' proposal to allow auction licensees to surrender their licenses and pay a one-time penalty of two thousand five hundred dollars (\$2500), which is equal to the amount of the initial up front payment required to participate in the auction, instead of the *NPRM's* proposed ten percent forfeiture. All payments a licensee has made in excess of \$2500 should be immediately refunded with interest. *MKS at 2.*

This amnesty should be available to all auction licensees that made their originally required down payments. In light of the difficulties that have plagued this proceeding, particularly those associated with the definition and administration of the various “grace period” proposals, it would be manifestly unfair, an abuse of discretion and arbitrary and capricious to discriminate against licensees that made their initial down payments. *MKS at 2-3; ITV/IALC at 8; Vega at 1; Bay Area at 5.*

The Coalition also supports In-Sync Interactive Corporation’s proposal that the re-auction of surrendered licenses be conducted consistent with the recently modified auction rules set forth in Part 1 of the Commission’s rules and regulations. *In-Sync at 15.* Pursuant to these rules small and very small businesses would enjoy a bidding credit.¹⁴ *In-Sync at 16.* In addition, the Coalition supports In-Sync’s recommendation that bidders who already hold 218-219 MHz licenses, and their affiliates, be afforded a 15 percent bidding credit. Such a credit would

¹⁴ The Coalition understands that in light of the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and the subsequent decision of the United States Court of Appeals for the District of Columbia Circuit in *Graceba Total Communications, Inc. v. FCC*, 115 F. 3d 1038 (D.C. Cir. 1997) the FCC will not grant bidding preferences based on race or gender in the re-auction. In the interest of fairness to bidders who did not receive race- or gender-based bidding preferences in the July, 1994 auctions the Coalition suggests that

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acknowledge the difficulties 218-219 MHz licensees have experienced as a result of the Commission's mishandling of the July, 1994 auctions and would encourage existing licensees to integrate new markets into their established business plans.¹⁵

The Commission should not object to a full and equitable amnesty program on the ground that treating auction licensees fairly will somehow establish an unfavorable precedent or unduly complicate future spectrum auctions. The IVDS auctions were so pervasively marked by bumbling and tainted by fraud as to be *sui generis*. Considering the embarrassment they have caused and the damage they have done to the Commission's reputation the Coalition is confident that the Commission will never again run an auction with so many problems. Moreover, the Commission should keep in mind that by granting full amnesty it will not only do justice to auction participants but will also go a long way towards restoring its

the Commission retroactively treat them as if they were and afford them a refund or credit for the appropriate amount.

¹⁵ The Coalition also urges the Commission to afford all auction licensees that have made down payments an exclusive ninety day window, prior to the general re-auction, during which such licensees may assume control over defaulted licenses by taking up the payment responsibilities associated with them. By so doing, the Commission will compensate surviving auction licensees for a portion of the hardship they have suffered as a result of earlier Commission negligence, raise money more quickly than it otherwise would, and preserve the integrity of 218-219 MHz service.

tarnished reputation. By so doing it will increase the attractiveness of future auctions to future participants and thereby advance the public interest.

D. The Coalition Supports the Proposed Changes in Technical Standards, Service and Construction Requirements.

The Coalition generally agrees with the Commenters that support the *NPRM's* proposed technical changes and changes in service and construction ("build-out") requirements.¹⁶ In contrast to the majority of commenters, DITV raises concerns that an increase in the effective radiated power ("ERP") of the mobile RTUs, eliminating the ceiling of 100 mW, might increase the likelihood of harmful interference to TV Channel 13 operations. *DITV* at 6-7. Similarly, Radio Telecom & Technology, Inc. has suggested that 218-219 MHz service may, at least under certain circumstances, interfere with broadcasts on Channel 13. *Comments of Radio Telecom & Technology, Inc. ("RTT")*, at 4. The Coalition submits that DITV's and RTT's concerns are unfounded and do not justify the imposition of special anti-interference regulations on 218-219 MHz service providers that are not applicable to other types of carriers.

¹⁶ See, e.g., *ITV/IALC* at 2; *DITV* at 6, *Comments of Interactive Services Trade Association ("ISTA")* at 4.

In its comments, CTI presented a study performed by Old Dominion University's Technology Applications Center ("TAC") which demonstrated that operation of an RTU at a full one watt resulted in no harmful interference to TV Channel 13 operations. *See, CTI at Attachment A.* Even if the TAC study did not support an increase in the maximum ERP for mobile RTUs, Section 15.5(c) of the Commission's rules requires all licensees to not to interfere with the operations of other licensees, and if harmful interference occurs, the licensees must cure interference. Section 15.5(c) applies to all licensees, including licensees in the 218-219 MHz band. Significantly, licensees in the 218-219 MHz bandwidth may cure interference by inexpensive "slot filters" to eliminate interference.

BSAL/HSAL noted the extreme burdens arising from the 100 mW limitation. BSAL/HSAL support a ceiling of 4W. The Coalition supports BSAL/HSAL's position in this regard.

DITV's and RTT's support for continued technical restrictions, even when the restrictions are not warranted, arises from their selfish desire to protect their own commercial interests. DITV has described its allegedly innovative equipment which operates at an ERP of less than 100 mW. RTT similarly produces equipment, which operates at an ERP of less than 100 mW, and has adapted the

technology to the 900 MHz bandwidth. Increase of the power limitations for 218-219 MHz services would minimize sales of the DITV and RTT equipment, each of which is more limited in operation and application.

Additionally, the Commission must not ignore the existing higher power facilities in the 216-218 and 220-222 MHz bandwidth.¹⁷ These facilities similarly pose an interference threat to TV Channel 13, yet no limitation on ERP in those services has been imposed.

E. Aggregation, Disaggregation and Partitioning

The Coalition supports the comments submitted by *Bay Area*, *CTI* and other Commenters that ask the Commission to allow licensees to aggregate their licenses by owning both frequency “blocks” in a particular market. The Commission originally limited licensees to owning 0.5 MHz in a market to prevent licensees from having monopoly power over the provision of interactive television service in a particular market. There is no longer any justification for this rule given that interactive television has never emerged as a workable, or

¹⁷ See Section 90.729 of the Commission's rules, 47 C.F.R. § 90.729, which allows operation of 220-222 MHz facilities up to 500 W ERP for base stations and 50 W ERP for mobile units. See also, Section 80.215 of the Commission's rules, 47 C.F.R. § 80.215, which allows operation of Maritime Services in the 216-218 MHz band up to 50 W output power for stations within TV Channel 13 grade B

(continued . . .)

marketable, service and continues to be plagued by technical problems. Meanwhile, as several Commenters have noted, Microsoft's "Web TV" system, has rendered the entire concept of "interactive television" obsolete. *See, e.g., BSAL/HSAL* at 7; *CRSPI* at 2. It is therefore quite absurd to worry that 218-219 MHz licensees will exercise market power with respect to IVDS service.

There are alternative uses for the 218-219 MHz spectrum, *e.g.* utilizing streaming video technologies to develop interactive classrooms, provide high-speed internet access, or encrypted data transmission. All of these services, however, can be provided every bit as effectively via other frequencies. Thus, 218-219 MHz licensees which use even a full MHz of bandwidth will not enjoy any sort of market power but will instead face vigorous competition from established wireless, television, cable and phone companies, all of which have greater bandwidth or capacity for transmission of communications. *See, BSAL/HSAL* at 7-8, 10. Indeed, 218-219 MHz licensees are presently at a severe competitive disadvantage because it is difficult, and perhaps impossible, to provide high speed Internet service without the ability to use a full MHz of band. Allowing the aggregation of existing licenses will simply create a level playing

contours, and grants licensees ninety (90) days to cure any allegations of harmful interference.

field between 218-219 MHz service and other services, it will not give 218-219 MHz licensees an unwarranted, and unsought, competitive advantage.

The Coalition also joins with the many commenters that support allowing geographic partitioning and spectrum disaggregation.¹⁸ It is consistent with Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 10, to allow licensees as much flexibility as possible in responding to market forces. If viable uses for geographic or spectrum fragments of 218-219 MHz licenses develop licensees will only be able to take advantage of them if they are free of unnecessary and artificial regulations. Removing sclerotic regulatory barriers is the only approach consistent with the public interest.¹⁹

F. Treatment of Lottery Licensees

The Coalition partially agrees with CTI's comments inasmuch as they argue that lottery licensees, who received their licenses essentially for free, have no right to be treated like auction licensees and should not be given special forbearance by the Commission. *CTI* at 7-11. The Coalition also shares CTI's view that proper utilization of those licenses originally allocated by lottery is vital to the health and development of 218-219 MHz service. Unlike CTI, however, the Coalition asks

¹⁸ See, e.g., *DITV* at 5; *Hughes* at 8; *CTI* at 19; *In-Sync* at 11.

¹⁹ See, 47 U.S.C. § 11.

the Commission to allow all lottery licenses to expire at the end of their original five year terms and re-auction them. Conducting a re-auction is the best and most straightforward way to prevent the unjust enrichment of lottery licensees and to ensure that 218-219MHz licenses are efficiently allocated to those that value them most highly.

IV. Conclusion:

WHEREFORE, for the foregoing reasons, IVDS Coalition respectfully submits that the Commission should adopt the rule revisions proposed in the *NPRM*, with the modifications suggested in these Reply Comments.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Carla S. Gales, professional assistant with the law firm of Hunton & Williams, hereby certify that on December 8, 1998, the foregoing Erratum to Reply Comments of IVDS Coalition, including the corrected Reply Comments were served upon the Federal Communication Commission by hand delivery; and upon the following counsel by First Class U.S. Mail, postage paid.

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A handwritten signature in cursive script, reading "Carla S. Gales", written in black ink. The signature is positioned above a horizontal line.

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